FILED
DEC 20 1984
ALEXANDER L. STEVAS
CLERK

Nos. 84-325 and 84-356

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
*Appellant,*

v.

COMMONWEALTH OF MASSACHUSETTS,
*Appellee.*

THE TRAVELERS INSURANCE COMPANY,
*Appellant,*

v.

COMMONWEALTH OF MASSACHUSETTS,
*Appellee.*

**On Appeal From The Supreme Judicial Court For The Commonwealth Of Massachusetts**

## BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF APPELLANTS

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December 20, 1984

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## BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF APPELLANTS

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The issue presented in this case is whether state legislatures are free, in the guise of "insurance regulation," to dictate the benefits that must be provided by insured employee benefit plans. This is an issue of paramount significance to the employees and employers of this Nation.

The decision below holds that a Massachusetts statute requiring particular mental health benefits to be included in all health insurance policies covering state residents—a statute expressly designed to prescribe the benefits to be provided by all employee health benefit plans in Massachusetts—is not pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA") or the National Labor Relations Act ("NLRA"). This result defeats a central purpose of ERISA and the NLRA—to reserve the regulation of employee benefit plans exclusively to federal law.

Unless reversed, the decision of the Massachusetts Supreme Judicial Court threatens to force employers either to assume the great burden and expense of conforming their insured employee benefit plans to ever-changing laws of fifty different states, or to abandon insured employee benefit plans altogether. Because of these grave consequences, the ERISA Industry Committee submits this *amicus curiae* brief urging reversal of the decision below. All parties have consented to the filing of this brief.

## THE INTEREST OF THE *AMICUS CURIAE*

The ERISA Industry Committee ("ERIC") is a nonprofit association of over one hundred major corporations doing business in a wide variety of American industries. A list of ERIC's members is set forth in the Appendix hereto. Through ERIC, member companies express their views to the courts, the Congress and the Executive Branch on issues affecting private pension and welfare plans.

ERIC represents a broad cross-section of firms maintaining health benefit plans and other welfare plans for their employees.[1] ERIC members' welfare plans cover tens of millions of beneficiaries. Some of these plans are collectively-bargained, while others cover non-union employees.

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[1] "Welfare plans" are employee benefit plans that provide non-pension benefits, such as health, accident or supplemental unemployment benefits. ERISA § 3(1), 29 U.S.C. § 1002(1); 29 C.F.R. § 2510.3-1.

All of the members of ERIC do business in more than one state, and a number have employees in all fifty states. Transfers of employees from one state to another are common. Many of the welfare plans of ERIC's members provide uniform benefits in all states where beneficiaries are located. Such nationwide benefit uniformity is important to employee morale and yields significant savings in administrative expenses.

Most of the welfare plans of ERIC's members are *insured plans*—that is, they provide benefits through the purchase of group insurance policies covering their beneficiaries. Under an insured plan, the employer pays a premium to the insurance company, and the insurance company generally assumes the risk as to the actual level of benefits that will be payable during the term of the policy.[2]

Some ERIC members maintain *non-insured plans*. Under these plans, the cost of benefits is the direct responsibility of the employer, who is sometimes referred to as a "self-insurer." As a rule, "self-insurance" is an economically feasible alternative to purchasing insurance from an insurance company only where a plan is large enough to allow the risk to be spread over a large population. While self-insurance has been growing, insured welfare plans remain much more common. For example, among medium and large firms nationwide, insured health plans covered about four times as many individuals as self-insured plans in 1982. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS, 1982, at 36 (1983).

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[2] Some insurance policies, particularly for large plans, are "experience rated," which means that the premium is based on the actual claims experience under the policy. Generally, under such policies, if the plan has a surplus in a particular year (premiums exceed claims and expenses), the plan receives a refund or credit of some portion of the premiums, while if the plan incurs a deficit (claims and expenses exceed premiums), the employer can choose between not renewing the policy, in which case the insurance company absorbs the deficit, or renewing the policy and paying some or all of the deficit over a period of time. Under experience-rated policies of this kind, risks are not borne entirely by the insurance company, but rather are shared by the insurance company and the employer.

Whether state governments can dictate the benefits of insured welfare plans is a question of great importance to ERIC's members and their employees. Welfare-plan benefits are a major issue in collective bargaining negotiations and a major element in the compensation of non-union employees. The companies participating in ERIC spend hundreds of millions of dollars each year on insurance premiums and administrative expenses for insured welfare plans.[3] Laws increasing the costs of insured welfare plans can have a substantial economic impact on a business.

If the states are permitted to enforce a crazy quilt of mandatory-benefit laws against insured welfare plans, employees and employers alike will suffer. Companies that wish to maintain insured plans will be forced either (a) to adopt all-encompassing benefit packages that satisfy the laws of every state, which will greatly increase welfare-benefit costs and force curtailment of other elements of compensation, or (b) to provide a variety of different benefits on a state-by-state basis, which will impose costly administrative burdens and cause dissatisfaction and confusion among employees. Free give-and-take in collective bargaining over the compensation of union employees will be supplanted by state prescription of a key element of compensation, as will employers' ability to offer their non-union employees attractive pay and benefit packages at acceptable cost. Employees will be forced to accept benefits they would not have chosen themselves, and to sacrifice benefits they would have preferred. The only remaining alternative for employers with insured plans will be to abandon their insured plans altogether and shoulder the risks and costs of "self-insurance"—risks and costs they decided *not* to incur when they established insured plans.

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[3] Nationally, health insurance premiums totalled $85 billion in 1981, most of which was paid by employers. HEALTH INSURANCE ASSOCIATION OF AMERICA, SOURCE BOOK OF HEALTH INSURANCE DATA, 1982-1983, at 6 (1982). Some three-fourths of the full-time employees of private firms are covered by health plans. U.S. DEPARTMENT OF LABOR, LABOR-MANAGEMENT SERVICES ADMINISTRATION, GROUP HEALTH INSURANCE COVERAGE OF PRIVATE FULL-TIME WAGE AND SALARY WORKERS, 1979, at 15 (1981).

In sum, if the decision below is not reversed, both employees and employers will be prevented from achieving the best possible benefits at the most reasonable cost. The result will be that fundamental policies of ERISA—national uniformity in benefit-plan regulation and the growth and soundness of employee benefit plans—will be frustrated. The NLRA's policy of leaving the basic terms and conditions of employment of unionized employees to private collective bargaining also will be defeated. ERIC's members and their employees have a vital interest in the vindication of these important Congressional policies.

## SUMMARY OF ARGUMENT

Massachusetts' mandated benefit statute is pre-empted by both ERISA and the NLRA.

The Massachusetts statute is pre-empted by ERISA because it was directed at employee benefit plans, not at insurance. ERISA's broad pre-emption provision supersedes all state laws relating to employee benefit plans. Uniform interstate employee benefit plans, which were the objective of ERISA's pre-emption provision, cannot flourish in an environment of varied and conflicting state regulations.

ERISA's insurance savings clause, which excepts laws that "regulate insurance" from pre-emption, does not apply to the Massachusetts statute. The Massachusetts court's literalistic reading of this clause to exempt from pre-emption any state law touching in any way on insurance would allow a narrow exception to consume the general rule; it would permit states to regulate employee benefit plans without any limitation, merely by adopting statutes that take the form of "insurance" laws. The insurance savings clause must instead be read in a fashion that harmonizes ERISA's primary purpose of barring piecemeal state regulation of employee benefit plans with ERISA's additional objective of preserving state insurance regulations that have secondary effects on employee benefit plans. The proper standard is one based on whether, taking account of its purpose and effect, the state law is primarily directed at employee

benefit plans or insurance. Since the Massachusetts statute was indisputably directed at regulating employee benefit plans and not at regulating the insurance industry, it is pre-empted by ERISA.

To the extent it applies to collectively-bargained employee benefit plans, the Massachusetts statute also is pre-empted by the NLRA. A state mandated benefit law that purports to override private union-management agreements concerning mandatory subjects of bargaining is pre-empted under *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959). No exception to the *Oliver* pre-emption doctrine applies to such a statute. This Court has never determined whether there is a "health and safety" exception to the *Oliver* pre-emption doctrine, but even if some such exception exists it cannot possibly extend so far as to permit the states to supplant private bargaining over fundamental elements of compensation. The exception to *Oliver* pre-emption for matters that Congress has expressly committed to the states also does not apply to state mandated benefit laws, for the McCarran-Ferguson Act did not confer upon the states the power to prescribe employee benefit levels; moreover, ERISA's objective of uniformity in interstate benefit plans is inconsistent with such state legislation.

## ARGUMENT

Section 47B of Chapter 175 of the Massachusetts General Laws requires that insurance policies providing hospital and surgical benefits for state residents also provide specified mental health benefits.[4] Section 47B requires that these same benefits be provided by "any employees' health and welfare fund which provides hospital expense and surgical expense benefits" in the state.

Thus, Section 47B mandates health benefits for *all employee benefit plans*—both insured and non-insured plans. That this was the express purpose of Section 47B is confirmed by the

[4] These include payment for sixty days' hospitalization in a mental hospital, benefits for hospitalization in a general hospital for mental or nervous conditions that are equal to the benefits provided for other illnesses, and $500 per year for certain out-patient mental health benefits.

available legislative material: the explanatory report of the joint committee that originated the bill makes clear that the committee's objective was to furnish mental health benefits for *employees*. MASS. GEN. COURT, JT. COMM. ON INSURANCE, ADVANCES IN HEALTH INSURANCE IN MASSACHUSETTS 1 (statute aimed at "the working person"), 3 (statute directed at "workers"), 4 (discussing employee group insurance policies) (1974).

The goal—and the effect—of Section 47B was *to govern employee benefit plans*. Section 47B was *not* a statute aimed at governing insurance companies, with only incidental or secondary effects on employee benefit plans. To the contrary, the Massachusetts legislature set out to regulate employee benefit plans and did so in unambiguous terms, addressing insurance simply as one step to that objective.

## I. SECTION 47B IS PRE-EMPTED BY ERISA

ERISA pre-empts all state laws insofar as they "relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). Exempted from this pre-emption, however, is any state law "which regulates insurance." *Id.* § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). (This is often referred to as the "insurance savings clause.") ERISA also provides that, in applying the insurance savings clause, an employee benefit plan shall not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts." *Id.* § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). (This is often referred to as the "deemer clause.")

The question confronting the Massachusetts Supreme Judicial Court in this case was whether Section 47B was (a) exempt from pre-emption as a law "which regulates insurance" within the meaning of ERISA's insurance savings clause, or (b) pre-empted by ERISA's basic pre-emption provision, particularly when that provision is read in conjunction with the expression of Congressional intent in the deemer clause to prevent state insurance laws from being used as a pretext for state regulation of employee benefit plans.

The Massachusetts court answered this question twice—once in 1982, and then again in 1984 after a remand from this Court. In its initial decision, the court began its analysis by artificially bifurcating Section 47B. The Commonwealth had conceded that insofar as the statute required specified benefits to be provided by *non-insured* employee benefit plans, it was pre-empted by ERISA. The court concluded that this aspect of the statute was severable, as a matter of general state-law severability doctrine, from the clause addressing insurance policies, and thus proceeded to review Section 47B as if it had been enacted solely as a law concerning insurance. *Attorney General* v. *Travelers Insurance Co.*, 385 Mass. 598, 601, 433 N.E.2d 1223, 1225, App. 13a, 15a-16a (1982), *vacated & remanded*, 103 S. Ct. 3563, App. 10a (1983), *on remand*, 391 Mass. 730, 463 N.E.2d 548, App. 1a, *prob. juris. noted*, 105 S. Ct. 320 (1984).

The court recognized that a literal reading of ERISA's insurance savings clause, exempting any state law bearing the label "insurance" from federal pre-emption, was untenable, as this would give the states virtually unlimited rein to govern employee benefit plans under the pretext of insurance regulation. As the court put it, this construction "might permit the State, through its insurance laws, to reach far into areas governed by ERISA, and thereby negate the unmistakable intent of Congress to work a broad preemption." *Id.* at 606, 433 N.E.2d at 1228, App. at 21a.

The court was thus faced with the task of drawing a line between non-pre-empted state insurance laws and those state laws that, while dealing in some way with insurance, *are* pre-empted. The court decided that the correct basis for distinction was whether the state statute was in "clear conflict" with affirmative regulatory provisions of ERISA. *Id.* The court thought it could discern in this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), intimations that ERISA's pre-emption was aimed solely at state laws that "affected a subject covered by ERISA," and that pre-emption should therefore be found only where a state law conflicted directly with substantive provisions of ERISA. 385 Mass. at

608, 433 N.E.2d at 1229, App. at 23a. Applying this standard, the court concluded that Section 47B was not pre-empted because ERISA's *affirmative* regulation of welfare plans is limited to reporting, disclosure, fiduciary conduct and plan administration, and because ERISA, in contrast to Section 47B, does not prescribe the "substantive content of plans." *Id.* The court rejected the idea that ERISA was also actuated by fundamental policies of encouraging private initiative in structuring healthy, growing, broad-based employee benefit plans and allowing plan sponsors to enjoy a climate conducive to nationwide plan uniformity without interference from conflicting state laws. *Id.*

On appeal, 103 S. Ct. 3563, App. 10a (1983), this Court vacated and remanded for further consideration in light of *Shaw* v. *Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983). The opinion in *Shaw* stressed that the exceptions from pre-emption in ERISA are "narrow." *Id.* at 2902, 2903. The decision in *Shaw* also completely undermined both the Massachusetts Supreme Judicial Court's conflict-based notion of ERISA pre-emption and the Massachusetts court's rejection of private initiative and uniformity as fundamental goals of ERISA.

*Shaw* held that ERISA pre-empted a New York anti-discrimination law and a New York law requiring that sick-leave benefits be paid to employees unable to work because of pregnancy. The Court specifically noted that ERISA "does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Id.* at 2897. Nonetheless, the Court found the New York statutes pre-empted by ERISA's broad pre-emption of any state law that "relates to" employee benefit plans—thus rejecting the notion of the Massachusetts court in this case that conflict with affirmative provisions of ERISA is the necessary predicate for pre-emption.

Further, *Shaw* cited *Alessi* for the proposition that ERISA, in "establishing benefit plan regulation 'as exclusively a federal concern,'" was aimed at minimizing "the need for interstate employers to administer their plans differently in each State in which they have employees." *Id.* at 2904 (quoting *Alessi*, 451 U.S. at 523). *Shaw* pointed out that allowing "varied and

perhaps conflicting" state laws to be enforced against employee benefit plans would undercut employers' freedom to administer efficient, uniform employee benefit plans and would leave employers with a series of unattractive options. Among these options would be setting up different plans in each state—with "the inefficiency of such a system presumably . . . paid for by lowering benefit levels"—and adopting uniform plans that met the requirements of all states—which would require the employer to "reduce wages or eliminate those benefits not required by any State" in order to "offset the additional expenses." *Id.* at 2904 n.25. These very same adverse consequences are the inevitable result of the Massachusetts court's decision in this case.

On remand, however, despite the clear rejection in *Shaw* of the Massachusetts Supreme Judicial Court's earlier reasoning, that court refused to alter its decision. *Shaw*'s repeated characterization of ERISA's pre-emption exceptions as "narrow" was dismissed as "dictum," and the Supreme Judicial Court instead insisted on its own view of the insurance savings clause as "broad." 391 Mass. at 733-35, 463 N.E.2d at 550-51, App. at 4a-6a. The court acknowledged that *Shaw* "rejected a conflict-based analysis" of ERISA's general pre-emption provision, but nonetheless reaffirmed (though it did not rely upon) its own conflict-based theory of ERISA's insurance savings clause. *Id.* at 734, 463 N.E.2d at 551, App. at 5a. Finally, while conceding that it was required to "accept as authoritative" this Court's conclusion in *Shaw* that ERISA was intended to foster private initiative and uniformity in benefit plans, the Massachusetts Supreme Judicial Court reversed course and treated these policies as irrelevant. *Id.* at 734, 463 N.E.2d at 551, App. at 6a. While in its earlier decision the court had recognized that ERISA's insurance savings clause cannot be applied literally, and had sought to interpret the clause based on the court's views of the policies animating ERISA, now, faced with an authoritative Supreme Court decision rejecting its notions of Congress' intent, the Massachusetts court set aside intent and reaffirmed its prior decision based simply on the "language" of the insurance savings clause —language the court had previously recognized to be the

beginning, not the end, of the analysis. *Id.* at 735, 463 N.E.2d at 551, App. at 6a.

The court below erred in finding that Section 47B is not pre-empted by ERISA. The Massachusetts court's original "conflict-based" approach to the insurance savings clause was clearly discredited by *Shaw,* and was effectively abandoned on remand. But the Court's ultimate literalist reading of the clause—a reading that the court itself had initially described as converting a limited exception into a limitless loophole—is equally untenable.

The Massachusetts court's literalist construction of the insurance savings clause allows basic policies behind ERISA to be defeated by statutes that are labelled "insurance regulation" but are actually aimed at governing employee benefit plans. This cannot be permitted, for, as this Court said in *Alessi,* "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the pre-emption provision." 451 U.S. at 525; *see also SEC* v. *National Securities, Inc.,* 393 U.S. 453, 460 (1969).[5] The words of a Congressional statute must be interpreted " 'in light of the purposes Congress sought to serve.' " *Dickerson* v. *New Banner Institute, Inc.,* 460 U.S. 103, 118 (1983) (quoting *Chapman* v. *Houston Welfare*

[5] Contrast, for example, this case with *Hewlett-Packard Co.* v. *Barnes,* 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd,* 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978); *Standard Oil Co.* v. *Agsalud,* 442 F. Supp. 695 (N.D. Cal. 1977), *aff'd,* 633 F.2d 760 (9th Cir. 1980), *aff'd mem.,* 454 U.S. 801 (1981); *St. Paul Electrical Workers Welfare Fund* v. *Markman,* 490 F. Supp. 931 (D. Minn. 1980); *Stone & Webster Engineering Corp.* v. *Ilsley,* 518 F. Supp. 1297 (D. Conn. 1981), *aff'd,* 690 F.2d 323 (2d Cir. 1982), *aff'd mem.,* 103 S. Ct. 3564 (1983); and *General Split Corp.* v. *Mitchell,* 523 F. Supp. 427 (E.D. Wis. 1981), decisions that held that ERISA's pre-emption provision barred California, Hawaii, Minnesota, Connecticut and Wisconsin statutes that dictated various aspects of the health benefit coverage to be provided by employee benefit plans in each state. If the decision below were correct, these states could have circumvented the decisions in these cases simply by rewriting their statutes in the form of "insurance regulation."

*Rights Organization,* 441 U.S. 600, 608 (1979)) (cited in *Shaw,* 103 S. Ct. at 2900).[6] Congress' purpose in Section 514 of ERISA was to make certain that the only laws that would govern employee benefit plans would be federal laws. Congress thereby sought to promote uniformity in the terms of those plans and to foster their growth through private initiative, unfettered by restrictive or conflicting state regulations. *Shaw,* 103 S. Ct. at 2904. To be certain to achieve this purpose, Congress adopted a pre-emption provision "virtually unique" in its breadth (*Franchise Tax Board* v. *Construction Laborers Vacation Trust,* 103 S. Ct. 2841, 2854 n.26 (1983))—a provision pre-empting any state law that would even "relate to" employee benefit plans.

It was in this context that Congress made a "narrow" exception (*Shaw,* 103 S. Ct. 2902, 2903) for any state law "which regulates insurance." Perhaps in some other context it might be linguistically permissible to describe any law dealing in any way with insurance as a law "which regulates insurance." But in *this* context, reading the statutory language "in light of the purposes Congress sought to serve," such an interpretation is *not* permissible. Such a construction would allow a state law whose primary object is to govern employee benefit plans to prevail over Congress' central purpose of reserving the governance of such plans to federal law. This would give the states unlimited power to regulate insured

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[6] *See also Azzaro* v. *Harnett,* 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd mem.,* 553 F.2d 93 (2d Cir.), *cert. denied,* 434 U.S. 824 (1977) (in light of Congress' broad pre-emptive purpose in enacting ERISA § 514, exception in subsection (b)(1) for "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" cannot be construed as leaving states with ongoing power to investigate present benefit status of persons whose benefits accrued before January 1, 1975); *Health Care Plan of New Jersey, Inc.* v. *Schweiker,* 553 F. Supp. 440, 444-47 (D.N.J. 1982), *aff'd mem.,* 707 F.2d 1391 (3d Cir.), *cert. denied,* 104 S. Ct. 71 (1983) (analyzing pre-emption under Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e-10, in terms of Congressional purposes); *SEC* v. *Variable Annuity Life Ins. Co.,* 359 U.S. 65, 80 (1959) (Brennan, J., concurring); *United States* v. *American Trucking Ass'ns, Inc.,* 310 U.S. 534, 543 (1940); *United States* v. *Turkette,* 452 U.S. 576, 580 (1981); *Sorrells* v. *United States,* 287 U.S. 435, 450 (1932).

employee benefit plans, even though ERISA specifically recognizes the primary role played by insured plans by defining "employee welfare benefit plan" as one that provides benefits "through the purchase of insurance or otherwise." ERISA § 3(1), 29 U.S.C. § 1002(1). Thus, here, as is often true of pre-emption savings clauses, "a literal application of the clause would not serve the statutory purpose." Hirsch, *Toward a New View of Federal Preemption,* 1972 U. ILL. L.F. 515, 540-41.

An appropriate interpretation of the insurance savings clause must recognize that Congress meant to leave traditional insurance regulation to the states—regulation, for example, of capitalization, fiduciary and investment standards, the form of policies and sales practices—but not to leave the states free to adopt laws formally classified as insurance laws yet having the primary purpose and effect of governing employee benefit plans. Construing the insurance savings clause in this way clearly requires pre-emption of the present statute—which was directly and explicitly aimed at employee benefit plans [7]—while leaving the states free to enact insurance laws with secondary or incidental effects on employee benefit plans.[8]

Under a proper reading of Section 514 of ERISA, if a state statute in some way concerns insurance and also "relates to" employee benefit plans, the pre-emption analysis must turn on the statute's overall object, considered in light of its purpose

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[7] ERISA's pre-emption provisions are directed at state laws that regulate "the terms and conditions of employee benefit plans." ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2). This is exactly the intent and result of Section 47B. The Massachusetts Supreme Judicial Court's bifurcation of the statute disregarded this fact, and failed to come to grips with the *federal-law* statutory interpretation question—independent of any state-law severability issue—of whether, in light of its purpose and effect, Section 47B can be considered a law "which regulates insurance" within the meaning of ERISA's insurance savings clause. *Cf. SEC* v. *Variable Annuity Life Ins. Co.,* 359 U.S. 65 (1959) (variable annuity contracts are not "insurance" within the meaning of the McCarran-Ferguson Act and other federal statutes, despite their treatment as "insurance" in the insurance statutes of several states).

[8] Thus, contrary to the assertion in *Wadsworth* v. *Whaland,* 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978), a proper interpretation of the insurance savings clause does not "emasculate" the clause; it prevents the savings clause from emasculating ERISA's basic pre-emption provision.

and effect. Pre-emption should be found where the statute is principally directed at governance of employee benefit plans, and not where it is principally directed at regulation of insurance. Only in the latter case can the statute properly be considered one "which regulates insurance" within the meaning of ERISA's insurance savings clause.

This standard, unlike the lower court's literalist rule, harmonizes ERISA's primary mandate of pre-emption with the "narrow" exception made by the insurance savings clause.[9] And it is the only standard that can be squared with Congress' intent in enacting Section 514 of ERISA. The deemer clause clearly demonstrates a Congressional concern that the insurance savings clause not become a pretext for state action evading ERISA's establishment of "benefit plan regulation 'as exclusively a federal concern'" (*Shaw*, 103 S. Ct. at 2904 (quoting *Alessi*, 451 U.S. at 523)). The legislative history confirms that ERISA's pre-emption provisions were adopted in order to preclude "multiple," "conflicting," and "inconsistent" state laws regulating employee benefit plans. *See* 120 CONG. REC. 29197, 29933, 29942 (1974) (remarks of Rep. Dent, Sen. Williams and Sen. Javits) (quoted in *Shaw*, 103 S. Ct. at 2901 & n.20).[10]

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[9] *Accord, Michigan United Food & Commercial Workers Fund* v. *Baerwaldt*, 572 F. Supp. 943 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. Aug. 16, 1983); Hutchinson & Ifshin, *Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*, 46 U. CHI. L. REV. 23, 66-69 (1978).

[10] Moreover, a Congressional committee with responsibility for ERISA, including among its members principal sponsors of the statute, declared in a report on ERISA pre-emption issued shortly after ERISA's enactment that "the Federal interest and the need for uniformity are so great that enforcement of state regulation should be precluded," and suggested that this policy was threatened by unduly broad constructions of "our efforts to ensure *minimum* disruption to the regulatory efforts of the states in the fields of insurance, banking and securities." ACTIVITY REPORT OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, H.R. REP. NO. 1785, 94th Cong., 2d Sess. 47 (1977) (emphasis added). The committee's reference to "minimum" disruption of state regulation indicates that a literalist reading of the insurance savings clause, permitting *no* disruption of state laws dealing with insurance, was not intended. The committee's report is entitled to significant weight in construing the insurance savings clause. *See, e.g., Bell* v. *Employee Security Benefit Ass'n*, 437 F. Supp. 382, 392 (D. Kan. 1977); *Hamberlin* v. *VIP Ins. Trust*, 434 F. Supp. 1196, 1199 (D. Ariz. 1977).

Therefore, because there can be no doubt, upon consideration of both the purpose and effect of Section 47B, that it was directed at the governance of employee benefit plans rather than at the regulation of insurance, the Court should hold that Section 47B is pre-empted by ERISA.

## II. SECTION 47B, AS APPLIED TO COLLECTIVELY-BARGAINED EMPLOYEE BENEFIT PLANS, IS PRE-EMPTED BY THE NLRA

Insofar as it applies to collectively-bargained plans, Section 47B also is pre-empted by the NLRA.

Many insured welfare plans are collectively bargained. Section 47B undeniably intrudes on the freedom of unions and management to negotiate the terms of employment contracts. The impact is significant. Health benefits are a principal issue in labor negotiations. State-mandated benefits of one kind often force workers to sacrifice other, preferred benefits of a different kind.

In *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283, 296-97 (1959), this Court held that the NLRA, by guaranteeing the right to private determination of the terms of collective bargaining agreements, pre-empts state laws that purport to prescribe such terms. Health benefits are a mandatory subject of bargaining. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.,* 404 U.S. 157, 159 (1971). Thus, *Oliver* squarely stands for the conclusion that the NLRA pre-empts Section 47B as applied to collectively-bargained insured plans.

This conclusion is supported by the Court's decision in *Alessi, supra.* There, in determining that ERISA pre-empted state laws prohibiting workers' compensation benefits from being offset against pensions, the Court, citing *Oliver,* stated that its holding was reinforced, insofar as collectively-bargained pension plans were concerned, by "the additional federal interest in precluding state interference with labor-management negotiations." 451 U.S. at 525. Pre-emption was compelled, the Court held, by the "direct clash between the state statute and the federal policy to keep calculation of pension benefits a

subject of either labor-management negotiations or federal legislation." *Id.* at 526 n.22. *See also Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978) (plurality opinion); *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975).

The Massachusetts Supreme Judicial Court cited two reasons for finding that Section 47B was not pre-empted by the NLRA. First, the court found that there was a "public health" exception to NLRA pre-emption. The court reached this conclusion based on a remark in *Oliver* (358 U.S. at 297) that the state law pre-empted in that case was not a "local health or safety regulation." 385 Mass. at 613, 433 N.E.2d at 1232, App. at 29a-30a. Second, the court concluded that there is no NLRA pre-emption where some other federal statute expresses a Congressional intent to permit state regulation. The court found such an intent in Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which provides that federal statutes should not be construed as superseding state laws enacted "for the purpose of regulating the business of insurance." 385 Mass. at 613-14, 433 N.E.2d at 1232, App. at 30a.

This Court has never held that there is a "public health" exception to the *Oliver* doctrine. Even if there were such an exception, it could not possibly reach so far as to permit states to dictate fundamental terms of collective bargaining agreements. If welfare-benefit terms of labor contracts were within a reserved state power to regulate "public health," it is difficult to see why every element of compensation would not come within such an exception. Such a doctrine would permit unlimited state control of collective bargaining.

Similarly, this Court has never held that the McCarran-Ferguson Act, which was enacted long before state legislatures first attempted to prescribe substantive terms of collective bargaining agreements through the vehicle of "insurance" laws, expresses a Congressional intent to permit such state legislation. The recent decision in *Malone* v. *White Motor Corp., supra,* indicates that any such intent must be "evident." 435 U.S. at 513 (plurality opinion); *see also New York Telephone Co.* v. *New York State Department of Labor,* 440 U.S. 519, 540-45

(1979) (plurality opinion); *id.* at 546 n.* (Brennan, J., concurring); *id.* at 547, 551 (Blackmun, J., concurring); *SEC* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 80 (1959) (Brennan, J., concurring); *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 412-13 (1954). This is a test that the court below did not apply and that there is no reason to believe the McCarran-Ferguson Act can pass. *See SEC* v. *National Securities, Inc.*, 393 U.S. 453, 458-59 (1969) (in enacting the McCarran-Ferguson Act in 1945, "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the states to tax insurance companies," and did not intend to confer upon the states any power to regulate insurance that they had not previously been held to possess). Moreover, for the reasons already discussed above in connection with ERISA preemption, a statute enacted with the express purpose of regulating employee benefit plans cannot properly be regarded as a statute adopted "for the purpose of regulating the business of insurance."[11] Finally, Section 4 of the McCarran-Ferguson Act, 15 U.S.C. § 1014, expressly provides that the Act shall not affect "application [of the NLRA] to the business of insurance"; the Massachusetts court's notion that this provision was directed solely at application of the NLRA to insurance-firm employees and not to other interactions between the NLRA and state insurance laws (385 Mass. at 614 n.25, 433 N.E.2d at 1232 n.25, App. at 30a n.25) seems to be entirely that court's creation, without support in either the language or the legislative history of Section 4.

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[11] *Cf. Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) (Blue Shield Pharmacy Agreements, which are referred to in Blue Shield insurance contracts to determine the level of reimbursement for prescription drugs, are not exempt from antitrust laws as "the business of insurance" under the McCarran-Ferguson Act, particularly in light of the principle that exemptions from the antitrust laws are to be narrowly construed); *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982) (same: rendering of opinions by chiropractors' peer review committee concerning whether particular services are covered by insurance policies).

Accordingly, neither of the grounds cited by the lower court for disregarding *Oliver* has merit, and this Court should hold that Section 47B, as applied to collectively-bargained plans, is pre-empted by the NLRA.[12] This issue need not be reached, however, if the Massachusetts Supreme Judicial Court's holding as to ERISA pre-emption is reversed.

## CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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December 20, 1984

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[12] *Accord,* Hutchinson & Ifshin, *supra* note 9, at 74-75; *see also Blue Cross & Blue Shield of Alabama* v. *Peacock's Apothecary, Inc.*, 567 F. Supp. 1258, 1277 (N.D. Ala. 1983).

# APPENDIX

## MEMBERS OF THE ERISA INDUSTRY COMMITTEE

Aetna Life and Casualty Compan·

Alexander & Alexander Services, Inc.

Allied Corporation

Aluminum Company of America

AMAX Inc.

American Telephone & Telegraph Company

Apache Corporation

ASARCO Incorporated

Atlantic Richfield Company

Bankers Trust Company

Bank of America N.T. & S.A.

Bell Communications Research

Bell South Corporation

Bethlehem Steel Corporation

The Boeing Company

Bristol-Myers Company

Buck Consultants, Inc.

Caterpillar Tractor Co.

Champion International Corporation

The Chase Manhattan Bank, N.A.

Ciba-Geigy Corporation

Citibank, N.A.

The Coca-Cola Company

Columbia Gas System Service Corp.

Combustion Engineering, Inc.

Connecticut General Life Insurance Co.

Consolidated Foods Corporation

The Continental Group, Inc.

Coopers & Lybrand

Dart & Kraft Inc.

Deere & Company

Delta Air Lines Inc.

Digital Equipment Corp.

R. R. Donnelley & Sons Company

The Dow Chemical Company

Dresser Industries, Inc.

E. I. du Pont de Nemours & Company, Incorporated

Eastman Kodak Company

Eli Lilly and Company

Equitable Life Assurance Society of the United States

Esmark, Inc.

Exxon Corporation

Federated Department Stores, Inc.

FMC Corporation

Ford Motor Company

General Electric Company

General Mills, Inc.

General Motors Corporation

W. R. Grace & Co.

The Greyhound Corporation

Grumman Corporation

GTE Corporation

Gulf & Western Industries, Inc.

Frank B. Hall Consulting Company

John Hancock Mutual Life Insurance Co.

A. S. Hansen, Inc.

Hazlehurst & Associates, Inc.

H. J. Heinz Company

Hewitt Associates

Honeywell Inc.

ICI Americas, Inc.

Ingersoll-Rand Company

International Business Machines Corporation

International Harvester Company

International Telephone & Telegraph Corporation

Internorth, Inc.

Johnson & Higgins, Inc.

Johnson & Johnson

Knight-Ridder Newspapers, Inc.

The LTV Corporation

Manufacturers Hanover Trust Company

William M. Mercer, Inc.

Metropolitan Life Insurance Company

Minnesota Mining & Manufacturing Co.

Mobil Oil Corporation

Monsanto Company

Mutual of America

NYNEX Corporation

Occidental Petroleum Services, Inc.

Olin Corporation

Owens-Corning Fiberglas Corporation

Owens-Illinois, Inc.

J. C. Penney Company, Inc.

Pennzoil Company

PPG Industries, Inc.

Procter & Gamble Company

The Prudential Insurance Company of America

Ralston Purina Company

RCA Corporation

Republic Steel Corporation

R. J. Reynolds Industries, Inc.

Rockwell International Corporation

Sears, Roebuck and Co.

Shell Oil Company

The Southland Corporation

Sperry Corporation

Standard Oil Company of California

Standard Oil Company of Indiana

Standard Oil Company of Ohio

Sun Company, Inc.

Tampa Electric Company

Tenneco Inc.

Texaco Inc.

Textron Inc.

Time Incorporated

Towers, Perrin, Forster & Crosby Inc.

The Travelers Insurance Company

TRW Inc.

Union Camp Corporation

Union Carbide Corporation

United States Steel Corporation

United States Tobacco Company

United Technologies Corporation

Unocal Corporation

Westinghouse Electric Corporation

The Wyatt Company

Xerox Corporation

## CERTIFICATE OF SERVICE

I certify that on this 20th day of December 1984 I served the foregoing brief on each of the parties by sending three copies thereof by first-class mail, postage prepaid, to:

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